

Issues: Group II Written Notice (failure to report without notice), and Termination due to accumulation; Hearing Date: 02/28/17; Decision Issued: 03/08/17; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10938; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10938

Hearing Date: February 28, 2017
Decision Issued: March 8, 2017

PROCEDURAL HISTORY

On November 4, 2016, Grievant was issued a Group II Written Notice of disciplinary action for failure to report to work without notice. Grievant was removed from employment based on the accumulation of disciplinary action.

On November 30, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 3, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 28, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Social Services employed Grievant as a Licensing Inspector. Grievant had prior active disciplinary action. On June 30, 2016 he received a Group II Written Notice for failure to report to work without notice.

On October 26, 2016, the Supervisor wanted to ask Grievant a question about one of the facilities he inspected. At approximately 9:15 a.m. and after she learned that Grievant was not in the building, the Supervisor called Grievant's State-issued cell phone and his personal cell phone. He did not answer the calls. The Supervisor left voice messages asking Grievant to call her. At approximately 11:34 a.m., the Supervisor sent a text message to Grievant's State-issued cell phone asking him to contact the Supervisor. He did not respond to her text message. At approximately 11:50 a.m., the Supervisor sent an email to Grievant's State email address asking him to contact her. His State email address would appear on his State-issued cell phone. Grievant did not respond to the email.

At approximately 2:22 p.m. on October 26, 2016, Grievant contacted the Supervisor and told her he was in his office. The Supervisor asked where Grievant had been. He replied "running errands".

Agency employees were expected to update their electronic calendars to indicate times when they were to be away from the office inspecting facilities or taking leave. Grievant did not update his calendar for October 26, 2016 to show that he would not be reporting to work. Grievant did not obtain pre-approved leave for October 26, 2016. He

did not notify the Supervisor that he would not be reporting to work in the morning on October 26, 2016 as scheduled.

Office hours for the Agency were from 8:15 a.m. until 5 p.m. Employees could set their work scheduled to begin as early at 6 a.m.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Failure to report to work without notice is a Group II offense.² The Agency alleged that Grievant failed to report to work without notice.

There were several defenses Grievant could have raised to the Group II Written Notice. At the conclusion of the Agency’s case, Grievant indicated he “was done” and apologized for “wasting our time.” He did not present any testimony or documents for the Hearing Officer’s consideration. Given that no evidence or arguments supported by evidence were presented, there is no basis for the Hearing Officer to disregard the Agency’s allegations that it has met its *prima facie* case.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”³ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

³ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁴

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.